

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

April 2, 2018

**Via Certified Mail**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1301 Constitution Avenue, NW, Room 6416 West  
Washington, D.C. 20004



**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

I write on behalf of Cause of Action Institute ("CoA Institute"), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability.

The Federal Records Act ("FRA") was amended to codify a definition of electronic messages that includes "electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals." 44 U.S.C. § 2911. Thus, electronic communications sent or received in the course of agency business, regardless of the method of message delivery, are federal records that should be properly captured, retained, and stored in a manner such that they can be searched and reproduced upon request. National Archives and Records Administration ("NARA") Bulletin 2015-02, "Guidance on Managing Electronic Messages," makes this clear. However, recent events call into question whether and how agencies are properly capturing, retaining, and storing electronic messages.

Therefore, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records:

1. All records regarding Environmental Protection Agency policies on the retention, management, and/or administration of electronic (*i.e.*, instant) messages, including but not limited to protocols such as SMS, MMS, Skype, Windows Messenger Service, XMPP, iMessage, Signal, BBM, *etc.*
2. All records regarding Environmental Protection Agency policies on employee use of electronic (*i.e.*, instant) messaging.

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<sup>1</sup> See CAUSE OF ACTION INSTITUTE, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/).

3. All records related to receipt, implementation, or compliance with NARA Bulletin 2015-02.
4. All records reflecting the electronic messaging systems installed on Environmental Protection Agency devices, including desktops, laptops, tablets, phones, and other mobile devices. Installed messaging systems include, but are not limited to, Google Hangouts, iMessage, Android Messages, Skype, Wickr Me, What's App, GroupMe, Allo, BlackBerry Messenger, Signal, Snapchat, Facebook Messenger, *etc.*
5. All records reflecting whether Environmental Protection Agency has enabled automatic electronic message archiving, indexing, and eDiscovery features on instant messaging platforms in use. For example, "History On/Off" in Google Hangouts or "Incognito Mode" in Allo.

The time period for all above items is July 29, 2015, the date of issuance of NARA Bulletin 2015-02, to present.<sup>2</sup> This request only seeks access to records related to electronic (*i.e.*, instant) messaging, using protocols such as those listed in Item #1, and does not seek records related to traditional, standalone email systems, unless those systems have built-in instant messaging capability or if electronic records are being managed together under a "Capstone" approach. The term "all records" includes, but is not limited to, policy memoranda, guidelines, handbooks, contracts, agreements/memoranda of understanding, or correspondence.

6. In addition, (i) the ten most-recently generated electronic (*i.e.*, instant) messages prior to the date of this request and, (ii) the first ten electronic (*i.e.*, instant) messages generated on or after July 29, 2015, from each of the following components:

- Office of Public Affairs
- Office of Congressional Affairs
- Office of Administrative and Executive Services
- Office of Human Resources
- Office of Enforcement and Compliance Assurance Office of Compliance

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<sup>2</sup> For purposes of this request, the term "present" should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002). The term "record" means the entirety of the record any portion of which contains responsive information. *See Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016) (admonishing agency for withholding information as "non-responsive" because "nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure").



To the extent that you have any questions about the scope of this request, CoA Institute is happy to discuss the matter with the FOIA officer processing this request and encourages you to contact us.

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. FOIA and applicable regulations provide that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>3</sup> In this case, the requested records will shed light on the “operations or activities of the government” by educating the public about the agency’s compliance with FRA obligations to preserve electronic messages. Because communication technology continues to evolve, the public has little knowledge on this topic and thus the records requested will contribute significantly to its understanding. The public deserves to know about the agency’s efforts to utilize technologies in a manner compliant with the FRA and FOIA and leverage technologies to enhance such compliance.

CoA Institute has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through the Institute’s regularly published online newsletter, memoranda, reports, or press releases.<sup>4</sup> In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request To Be Classified as a Representative of the News Media**

For fee status purposes, CoA Institute also qualifies as a “representative of the news media” under FOIA.<sup>5</sup> As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.<sup>6</sup> CoA Institute satisfies this test because it gathers

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<sup>3</sup> 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

<sup>4</sup> *See also Cause of Action*, 799 F.3d at 1125-26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>6</sup> *See Cause of Action*, 799 F.3d at 1121.



information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>7</sup> These distinct works are distributed to the public through various media, including the Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" contemplates that organizations such as CoA Institute, which electronically disseminate

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<sup>7</sup> COA INSTITUTE, EVADING OVERSIGHT: THE ORIGINS AND IMPLICATIONS OF THE IRM CLAIM THAT ITS RULES DO NOT HAVE AN ECONOMIC IMPACT (Jan. 2018), <http://coainst.org/2mgpYAu>; CoA Institute, *Documents Reveal Special Interest Groups Lobbied HUD for Mortgage Settlement Funds* (Aug. 8, 2017), <http://coainst.org/2yLaTyF>; CoA Institute, *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>; COA INSTITUTE, SENSITIVE CASE REPORTS: A HIDDEN CAUSE OF THE IRS TARGETING SCANDAL (Mar. 2017), <http://coainst.org/2y0fbOH>; CoA Institute, *Sec. Vilsack followed ethics guidelines when negotiating his future employment*, (Feb. 3, 2017), <http://coainst.org/2mJljJe>; COA INSTITUTE, INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION (Oct. 2016), <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption* (Aug. 17, 2016), <http://coainst.org/2doJhBt>; COA INSTITUTE, MEMORANDUM: LEGAL ANALYSIS OF FORMER SECRETARY OF STATE HILLARY CLINTON'S USE OF A PRIVATE SERVER TO STORE EMAIL RECORDS (Aug. 24, 2015), <http://coainst.org/2eXhXe1>; CoA Institute, *CIA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhHP>; *Hearing on Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. (Aug. 5, 2015) (statement of Erica L. Marshall, Counsel, CoA Inst.), <http://coainst.org/2mJC8DH>; *Hearing on Watchdogs Needed: Top Government Investigator Positions Left Unfilled for Years Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 114th Cong. (June 3, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2mrwHr1>; *Hearing on Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environmental and Natural Resources Divisions and the U.S. Trustee Program Before the H. Comm. on the Judiciary*, 114th Cong. (May 19, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2n7LxWG>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), <http://coainst.org/2as088a>; *Hearing on Potential Reforms to the Freedom of Information Act (FOIA) Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 27, 2015) (statement of Daniel Z. Epstein, Exec. Dir., CoA Inst.), <http://coainst.org/2lLsph8>; *Hearing on IRS: TIGTA Update Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 26, 2015) (statement of Prashant K. Khetan, Chief Counsel, CoA Inst.), <http://coainst.org/2nn5iFJ>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), <http://coainst.org/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), <http://coainst.org/2aJh901>; see also CoA Institute, *Newsletters*, <http://causeofaction.org/media/news/newsletter/>.



information and publications via “alternative media[,] shall be considered to be news-media entities.”<sup>8</sup> In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute’s news media status.<sup>9</sup>

### **Record Preservation Requirement**

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>10</sup>

### **Record Production and Contact Information**

In an effort to facilitate document review, please provide responsive documents in electronic form in lieu of a paper production. If some responsive records can be produced more readily, CoA Institute requests that they be produced first and the remaining records be produced on a rolling basis.

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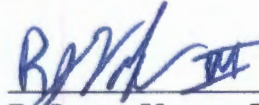
<sup>8</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>9</sup> See, e.g., FOIA Request 2016-11-008, Dep’t of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep’t of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Management (Oct. 21, 2016); FOIA Request 092320167031, Centers for Medicare & Medicaid Services (Oct. 17, 2016); FOIA Request 17-00054-F, Dep’t of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dept. of State (Aug. 11, 2016); FOIA Request 2016-00896, Bureau of Land Mgmt., Dep’t of the Interior (Aug. 10, 2016); FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep’t of Justice (Aug. 2, 2016); FOIA Request 796939, Dep’t of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep’t of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request HQ-2015-01689-F, Dep’t of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep’t of Agric. (Aug. 6, 2015); FOIA Request 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep’t of Energy (Nat’l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Comm’n Comm’n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep’t of Energy (Dec. 4, 2014); FOIA Request LR-2015-0115, Nat’l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request GO-14-307, Dep’t of Energy (Nat’l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013).

<sup>10</sup> See 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

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If you have any questions, please contact me at (202) 499-4232 or [james.valvo@causeofaction.org](mailto:james.valvo@causeofaction.org). Thank you for your attention to this matter.

A handwritten signature in blue ink, appearing to read "R. Valvo III", is written over a horizontal line.

R. JAMES VALVO, III  
COUNSEL & SENIOR POLICY ADVISOR

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